Supreme Court, U. S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1902

JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se

-vs-

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jean C. Rosenbaum,
Petitioner, Pro Se
1354 West Greenleaf Street
Chicago, Illinois
973-6047 (312)

INDEX

	Page
Table of Authorities	ii,iii
Petition for Writ of Certiorari, Opening	1, 2
Opinions Below	2, 3
Jurisdiction	3, 4
Questions Presented	4, 5
Constitutional Provisions and Rules	5-8
Statement of the Case	9-17
1973 Income Tax	9-16
1974 Income Tax	16, 17
Reasons for Granting the Writ	17-21
Conclusion	21
Petitioner's Affidavit	22
Notice of Filing	At End
Proof of Service	At End

APPENDIX

U. S. Court of Appeals Order, March 5, 1980 ..... Appendix (1)

U. S. Court of Appeals Order, March 5, 1980, with Attached Tax Court Opinion ..... Appendix (2)-(14)

U. S. Court of Appeals Order, March 26, 1980 ..... Appendix (15)

U. S. Court of Appeals Order, April 9, 1980 ..... Appendix (16)

TABLE OF AUTHORITIES

Page

United States Constitution

Article IV 2,4,5,18,21

First Amendment 2,4,6,13, 15,21

Fifth Amendment 2,4,6,13,15, 18,19,21

Ninth Amendment 2,4,6,14,15 21

Tenth Amendment 2,4,6,13,14, 15,18,21

Thirteenth Amendment 2,4,6,21

Fourteenth Amendment 2,4,7,13,15, 18,19,21

Sixteenth Amendment 2,4,7

Federal Court Cases

Barter v. United States,
550 F. 2d 1239 (1977)
Cert. denied 434 U.S. 1012 (1978) . 15

Griswold v. Connecticut,
381 U.S. 479 (1965) 20

Neeman v. Commissioner, 26 T.C. 864,
(1956) aff'd per curiam 255 F. 2d
841 (2d Cir. 1958), cert denied,
358 U. S. 841 (1958)..... 15

Marks v. Schlesinger
384 F. Supp. 1373 (1974) 15

Reed v. Reed
404 U.S. 71 (1971) 19

Rosenbaum v. Commissioner
38 T.C.M. (CCH) 889 (1979) 3

Tyler v. United States
281 U.S. 497 (1930) 19

TABLE OF AUTHORITIES

(con'd.)

	Page
Statutes-Federal	
28 U.S.C.A., Federal Rules of Federal Procedure, Title III, Rule 13	9
28 U.S.C. §1254 (1)	4
Internal Revenue Code of 1954 (26 U.S.C.)	
Section 71 (a)(3)	5,7,12, 17
Section 143	5,7,8, 12,17
Section 6212(a)	17
Section 6511	16
Section 7441	9
Treasury Regulation Under the 1954 Code, Section 1.71-1(b)(3)(i) ..	5,8,17
Statutes-State	
Illinois Revised Statutes (1971)	
Ch. 40:16	11
Ch. 68:24	10
Ch. 68:31	10
Miscellaneous	
Senate Report No. 1622, 83d Cong. 2d Sess., pp. 10-11 (3 U.S.C. Cong. & Adm. News (1954), 4621, 4639-4640	17

NOTE: The prior Courts which heard this case have been informed by Petitioner that unusual errors and/or pattems have been found in recent years at both the State and Federal levels in laws affecting primarily family women. All originated approximately between 1950 and 1955, which were years of international turmoil, and a devious force may have been at work.

The Internal Revenue Code of 1954 is from a similar date, and there may be a relationship.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO.

JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se

-vs-

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner-Appellant, Jean C. Rosenbaum, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit at Chicago, Illinois, entered in this proceeding on March 5, 1980. The United States Court of Appeals for the Seventh Circuit (hereinafter referred to as the Federal Appeal Court) affirmed the earlier Judgment and Opinion of the United States Tax Court holding that the Internal Revenue Code of 1954 does not violate the UNITED STATES CONSTITUTION in the Sections under attack, and

Appellant's Constitutional rights thereunder, by requiring her to pay income tax on Court-ordered temporary alimony, although she was and is the legal wife, and mother of three children, there never having been separate maintenance, legal separation, a written separation agreement or divorce. Appellant has contended that she should be accorded the identical treatment tax-wise as a wife without marital and family problems, whose husband willingly meets his obligation to support her as established under State law -- that not to accord her equal treatment is a violation of her rights under the following clauses of the UNITED STATES CONSTITUTION:

ARTICLE IV	AMENDMENT X
AMENDMENT I	AMENDMENT XIII
AMENDMENT V	AMENDMENT XIV
AMENDMENT IX	AMENDMENT XVI

Also at issue are Petitioner's filing status under the foregoing Constitutional clauses, and the dismissal of her suit re her 1974 income tax return due to a late response to a Notice of Deficiency, although the alternative method, an Amended Return, was timely filed.

OPINIONS BELOW

The Opinion of the Federal Appeal Court appended hereto (Appendix (1)(2)), entered

on March 5, 1980, is an unpublished Opinion, stamped "Not To Be Cited."

The Opinion of the United States Tax Court appended hereto (Appendix (4)), entered on June 5, 1979, labeled by that Court as T. C. Memo 1979-221, is cited at 38 T.C.M. (CCH) 889 (1979).

A timely SUGGESTIONS FOR A REHEARING IN BANC, OR IN THE ALTERNATIVE, PETITION FOR REHEARING, was filed March 19, 1980, and denied in an Order entered on April 9, 1980 appended hereto (Appendix (16)).

A timely Motion was also filed on March 19, 1980 requesting a published Opinion, and denied in an Order entered March 26, 1980 appended hereto (Appendix (15)).

A timely NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES was filed on April 25, 1980.

JURISDICTION

This Petition for Writ of Certiorari is being docketed in this Court within 90 days from the entry of the Federal Appeal Court Opinion on March 5, 1980, and the denial of the Suggestions For a Rehearing in Banc, Or in the Alternative, Petition for Rehearing on April 9, 1980. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), which states:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED

1. Whether the following clauses of the Constitution of the United States --

ARTICLE IV, Section 1 (Full faith and Credit)
AMENDMENT I (Redress for Grievances)
AMENDMENT V (Due Process of Law)
AMENDMENT IX (Rights Retained by People)
AMENDMENT X (Reserved Rights of States and People)
AMENDMENT XIII (Involuntary Servitude)
AMENDMENT XIV (Due Process and Equal Protection of Law)
AMENDMENT XVI (Congressional Power to Lay Taxes on Income)

have been violated by the following income tax regulations in connection with the Internal Revenue Code of 1954, and their application to Appellant, although she is a legal wife and mother who has not filed for separate maintenance, legal separation or divorce, and has not signed a written separation agreement:

Internal Revenue Code of 1954, (26 U.S.C.)

Section 71 (a) (3) -- Requiring a separated wife to pay income tax on Court-ordered support if a joint return is not filed.

Section 143 -- Permitting one spouse with whom the children live to file as "unmarried" (although actually married) under certain conditions, while the other parent-spouse is required to file as "married."

Treasury Regulation Under the 1954 Code:

Section 1.71-1(b)(3)(i) -- Specifically requiring a wife to pay income tax on Court-ordered support, though she is not legally separated or divorced, and has not signed a written separation agreement, if a joint income tax return is not filed, and the spouses live apart.

2. Whether the dismissal of Appellant's suit for a refund on her 1974 Income Tax Return was properly affirmed by the Federal Appeal Court because she filed a late answer to a Notice of Deficiency (she followed the advice of the Internal Revenue Service in Chicago, Illinois at all times), although she filed a timely Amended Return for 1974 within the three year period allowed.

CONSTITUTIONAL PROVISIONS AND RULES

1. ARTICLE IV, Section 1, UNITED STATES CONSTITUTION:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

2. AMENDMENT I, UNITED STATES CONSTITUTION:

"Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. AMENDMENT V, UNITED STATES CONSTITUTION:

"No person ..... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. AMENDMENT IX, UNITED STATES CONSTITUTION:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

5. AMENDMENT X, UNITED STATES CONSTITUTION:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

6. AMENDMENT XIII, UNITED STATES CONSTITUTION:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction Section 2. Congress shall have power to enforce this article by appropriate legislation."

7. AMENDMENT XIV, UNITED STATES CONSTITUTION:

"Section 1. All persons .....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

8. AMENDMENT XVI, UNITED STATES CONSTITUTION:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

9. INTERNAL REVENUE CODE OF 1954: (26 U.S.C.)

Section 71 (a) (3) --

"Decree for support.--If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly."

Section 143 --

"(a) General Rule.--For purposes of this part and part V--

(1) The determination of whether an individual is married shall be made as of the close of his taxable year; except that if his spouse dies during his taxable year such determination shall be made as of the time of such death; and

(2) An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

(b) Certain Married Individuals Living Apart.--For purposes of this part and part V, if--

(1) an individual who is married (within the meaning of subsection (a)), and who files a separate return maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of a dependent (A) who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the individual, and (B) with respect to whom such individual is entitled to a deduction for the taxable year under section 151,

(2) such individual furnishes over half of the cost of maintaining such household during the taxable year, and

(3) during the entire taxable year such individual's spouse is not a member of such household,

such individual shall not be considered as married.

10. TREASURY REGULATION § 1.71-1(b)(3)(i):

"Where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable year, paragraph (3) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after August 16, 1954, from her husband under any type of court order or decree (including an interlocutory decree of divorce or a decree of alimony pendente lite) entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. It is not necessary for the wife to be legally separated or divorced from her husband under a court order or decree; nor is it necessary for the order or decree for support to be for the purpose of enforcing a written separation agreement."

STATEMENT OF THE CASE

The jurisdiction of the United States Tax Court was initially invoked under the Internal Revenue Code of 1954, 26 U.S.C. §7441.

The jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked under Federal Rules of Federal Procedure, Title III, Rule 13, 28 U.S.C.A. (page 122).

1. 1973 INCOME TAX. Appellant, Jean C. Rosenbaum is a married individual. She timely filed a return for the year 1973 reporting other income of $1,504.50 of which $1,475.00 was temporary alimony. She checked her filing status as both "single" and "married filing separately," because of an undecided divorce appeal before the Appellate Court of Illinois, First District and ambiguous family circumstances. She computed her tax, however, using the "single" status, believing she should be entitled to the identical filing status as her husband, who refused to file a joint return.

On May 5, 1976, after lengthy negotiations with the Collector of Internal Revenue at Chicago, Illinois, Petitioner mailed an amended

return for the taxable year 1973, which was received May 11, 1976, claiming a refund of of $260.50. She was now definitely married, the appeal having been finalized, but again claimed "single" status (because this privilege was accorded to her husband), and decreased her income by the amount of the temporary alimony received, $1,475.00, since it represented the support she was entitled to as a wife under Illinois Revised Statutes, (1971), Ch. 68:24, Ch. 68:31. A Notice of Deficiency determined instead that her filing status should be "married filing separately" and she was liable for an additional $31.00.

Petitioner and Kurt Rosenbaum (hereinafter Husband), were married in 1948 at Chicago, Illinois, and three children were born of this marriage. Husband deserted his family in 1965, the aftermath of mental and emotional illness, and the couple have lived separate and apart since that time against Petitioner's wish.

In 1969, Husband filed for divorce in the Circuit Court of Cook County, Illinois. It was not granted due to insufficient grounds.

In 1971, Husband filed for a partition of the family home, and added a divorce count in January 1972. Husband wilfully refused to meet his Illinois statutory obligation of support, and Petitioner filed for temporary alimony under Illinois Revised Statutes (1971), Ch. 40:16, which provides:

> ....in every suit for divorce, the wife or the husband when it is just and equitable, shall be entitled to alimony during the pendency of the suit ....

She contested the suit, and received an oral temporary alimony award of $25.00 weekly on November 9, 1972; the Order was signed November 20, 1972.

During Petitioner's taxable year 1973, Husband paid his legal wife $1,475.00 in compliance with the support Order, consisting of $175.00 late payments attributable to 1972, and $1,300.00 representing 1973 payments.

On February 20, 1974, through legal carelessness, a judgment for divorce was entered in favor of Husband. Petitioner immediately appealed Pro Se, and the divorce judgment was reversed and remanded; then the divorce complaint against her was dismissed on December 1, 1976. Petitioner has never filed for legal

separation, separate maintenance or divorce, and has never signed a written separation agreement.

During 1973 and 1974, Petitioner resided in the family home, maintained it herself, and made it available at all times as a residence for her children. During this period, of their own choice (when not away at school) the children resided primarily with their father. Petitioner's funds, as well as Husband's, were used to support the children, but he took the tax deduction.

Respondent determined that $1,300.00 of the temporary alimony received by Petitioner was includible in her gross income for 1973 under Section 71(a)(3), Internal Revenue Code of 1954. It was also determined that Petitioner's proper filing status was "married filing separately," under Section 143 of the same 1954 Code, although her Husband is permitted to file as "unmarried head of household" under the same Section, and enjoy a lower tax rate.

Appellant believes that Respondent's decision conforms to the requirements of the

Internal Revenue Code of 1954, but has challenged the quoted Sections of the Code as being unconstitutional and in violation of the United States Constitution in their essence.

She has argued that wives with marital problems are entitled to equal protection of the law, United States Constitution, Amendment V, Amendment XIV, to the same degree as wives without marital problems, and that a tax based on a husband's attitude toward his wife is unconstitutional. That further, her right to redress for grievances, United States Constitution, Amendment I, has been impaired by the requirement that she pay income tax on Court-ordered support, when a wife who does not have to seek Court action to enforce statutory support rights is not required to pay income tax on support funds. The control of marriage laws is confined to the States, United States Constitution, Amendment X, but the Federal Government has intruded into this realm with said income tax laws that determine income taxes based on where the spouses live and the condition of their marriage, though they are legally man and wife. This conflicts with

State attitudes, which uphold legal marriages, and the wife's right to support. Under the United States Constitution, Amendment X, the State's point of view has supremacy in this area, and the Federal Government, Petitioner contends, has overstepped its authority granted under the United States Constitution by equating legal separation with a mere living apart, in defiance of the right of the States to determine marital status.

The Opinion of the United States Tax Court, affirmed by the Federal Appeal Court, cites law that specifically applies only to divorced or legally separated spouses. The Appellant, who is not legally separated or divorced, and has not filed for separate maintenance or signed a written separation agreement, believes it is an infringement on her constitutionally protected right to protect her family status, United States Constitution, Amendment IX, to have such law applied to her situation. "There is a right under this Amendment (First Amendment) for a person to keep private the intimate

details of his sex life," Marks v. Schlesinger, 384 F. Supp. 1373, 1376 (1974).

Barter V. United States, 550 F. 2d 1239, 1240 (1977), cert. den. 434 U.S. 1012 (1978), cited by the United States Tax Court Opinion (page 8) (Appendix hereto (12)) ruled that the marriage penalty in the Code is constitutional (different rates for single people, and married people living together), but is not on point. Neeman v. Commissioner, 26 T. C. 864, 868 (1956), aff'd. per curiam 255 F. 2d 841 (2d Cir. 1958), cert. denied 358 U.S. 841 (1958) quoted by the same Opinion (Appendix (9)) to affirm the constitutionality of Section 71(a)(3) of the 1954 Code, also applies specifically to couples who are divorced or legally separated. Petitioner's contention that her placement tax-wise in the identical category is a violation of her rights under the United States Constitution, Amendments IX and X, as well as V and XIV and, additionally, I, was not specifically ruled on by the Federal Appeal Court. Nor was her contention that she should, under the unique circumstances, enjoy the protection of the same clauses of the United States Constitution as to her filing status.

She also stated support is sustenance, not income.

2. 1974 INCOME TAX. The same issues are in Petitioner's claim for a refund with respect to her taxable year 1974. This case was dismissed by the United States Tax Court because of an untimely response to a Notice of Deficiency issued after the President ordered a tax rebate to all citizens who qualified. Petitioner qualified for a rebate of $81.95, from which $72.50 was automatically deducted by the Internal Revenue Service; she received a check, therefore, for $9.45, and was in constant contact with the Internal Revenue Service in Chicago, Illinois, and its District Conference Staff, thereafter about the matter. At all times she attempted to abide by their instructions, and was still deep in negotiations with them when the Notice of Deficiency in question was issued. This, she believes, was an irregular procedure and later, at the advice of the Internal Revenue Service, she timely filed an Amended Return for 1974 within the three years allowed, 26 U.S.C. §6511 to cover the issue. This Amended Return has been ignored by the Courts, as the dismissal was entered and affirmed because of the late re-

response to the Notice of Deficiency.

Petitioner has also asserted that to the best of her knowledge, the Notice of Deficiency for her taxable year 1973 was not sent by registered mail by Respondent as required by the 1954 Code, 26 U.S.C., §6212 (a). In the Record on Appeal there is no evidence presented by Respondent for the 1973 taxable year to the contrary.

REASONS FOR GRANTING THE WRIT

The Internal Revenue Code of 1954, Section 71 (a)(3), and Section 143, as well as Treasury Regulation, Section 1.71-1(b)(3)(i) thereunder, is prejudicial and sex-oriented against the wife. It favors the husband and defies the Constitutionally granted State regulation of marital status. The Congressional intent when passing these Sections into law, as expressed by Senate Report No. 1622, 83d Cong., 2d Sess., pp. 10-11 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4639-4640, is --

> "Your committee made two changes in the House provision relating to alimony and separation payments .... it also provides that the treatment is to be applicable where a wife is separated from her husband if she receives periodic payments from him under any type of

> decree (entered after the date of enactment of this bill) requiring the husband to make payments for her support and maintenance ..... The second amendment was made by your committee to cover cases where amounts made under a court decree for support have not been called separate maintenance payments. So long as the husband and wife are separated and not filing a joint return it would appear that the tax effect in such cases should be the same as in the case of a decree of separate maintenance."

The United States Constitution, Article IV, Section 1 requires that full faith and credit be given in each State to the public acts of every other State. Marital laws, under Amendment X of the same Constitution, are within the power of the State. In Illinois, Separate Maintenance is legal separation; Congress is required to recognize the State concept, and not impose a "legal separation" penalty on a wife who is merely living apart at the whim of her husband. To do so is to deprive her of her right to due process and equal protection of law, United States Constitution, Amendment V, Amendment XIV.

All citizens have a right to petition the Government for redress of grievances, United States Constitution, Amendment I. A wife who is forced into Court to pursue her statutory right of support, is merely petitioning for

a redress of grievance; levying an income tax on Court-ordered support, then, has all the aspects of punishment for pursuing a Constitutional right. Reed v. Reed (1971), 404 U. S. 71, 76. --

> "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike."

To impose an income tax on sustenance-support money received by a legal wife through Court Order only because her husband has chosen to live elsewhere and not willingly meet his statutory obligations toward her is a complete denial of due process and equal protection of law, United States Constitution, Amendment V, Amendment XIV, and violates her rights. Tyler v. United States (1930), 281 U. S. 497, 503-504:

> "The possibility that a federal statute under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment must be conceded."

The Internal Revenue Code of 1954, in the Sections under attack, has invaded the marital privacy of the Rosenbaum spouses. "Right to marital privacy is a fundamental right, pro-

tected by the First and Ninth Amendments," Griswold v. Connecticut, (1965), 381 U. S. 479, 495-496. Petitioner has the right to conduct her family affairs as she sees fit, and to pursue her redress for grievances in the Courts, without paying a tax penalty.

From the foregoing, it can be seen that the Federal Appeal Court ruled in such a way that conflicts with prior United States Supreme Court decisions with related concepts. Additionally, the questioned portions of the 1954 Code actually reward a man for deserting his wife with an increased deduction. If he pays $25.00 weekly toward the sustenance of his wife through a Court Order, he can take a $1,300.00 income tax deduction for the year, more than the dependent exemption he would receive if supporting her without Court action!

As there appears to be no prior decision from the United States Supreme Court that encompasses the issues precisely on point, and in view of the importance of the family as a social issue, this matter appears to require serious study and consideration by the Supreme Court. The questions are substantial.

The Federal questions were raised in the United States Tax Court in Petitioner's "Reply Brief." She was not required to file the first Brief -- this Respondent did by Order of Court. Petitioner's Reply Brief discussed the United States Constitution, Article IV, Section 1, Amendment IX, Amendment X and Amendment XIV, as well as Amendment I, Amendment V and Amendment XIII. The point under Amendment XVI was raised in the Federal Appeal Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Seventh Circuit.

Respectfully submitted,
Dated:

JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se
1354 West Greenleaf Street
Chicago, Illinois 60626
973-6047 (312)

May 31, 1980

See copy marked "Notarized" for signatures.

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

AFFIDAVIT

JEAN C. ROSENBAUM, being first duly sworn on oath, deposes and states she is the Petitioner-Appellant, Pro Se, in the aforestated cause, that she has read the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT by her subscribed, that she knows the contents thereof, and the same is true in substance and in fact, including the Appendix.

DATED: _____

_____
JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se

I, _____, a Notary Public for and in the State and County aforesaid, do hereby certify that the foregoing document was sworn and subscribed to before me by Jean C. Rosenbaum this 31st day of May, 1980.

_____
NOTARY PUBLIC

My commission expires: _____

Unpublished Per Curiam Order

13

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 5, 1980

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

JEAN C. ROSENBAUM, Petitioner-Appellant,	) On Appeal) from the) Decision
No. 79-2154 vs.	) of the) United
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	) States) Tax Court

This cause came on to be heard on the transcript of the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the United States Tax Court is AFFIRMED, in accordance with the order of this court entered this date. Each party to bear its own costs.

Appendix (2)

Unpublished Order; Not To Be Cited

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: February 28, 1980

March 5, 1980

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

JEAN C. ROSENBAUM, Petitioner-Appellant,	) On Appeal) From the) Decision
No. 79-2154 vs.	) of the) United
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	) States) Tax Court

O R D E R

Petitioner-appellant instituted this action in the Tax Court seeking a redetermination of a deficiency in federal income tax in the amount of $31 for taxable year 1973. In the amended return for 1973, petitioner had claimed a refund of $260.50 on the grounds that $1,475 she received in temporary alimony payments from her husband pursuant to court order should be excluded from her income and that her filing status should be "single."

During the period in issue, petitioner and her husband were living separate and apart from each other. These arrangements were not made

by petitioner's choice. In January 1972, petitioner's husband had filed a petition for divorce which was pending throughout 1973. Petitioner herself has never filed for separate maintenance, legal separation or divorce.

Respondent denied petitioner's claim for refund determining that $1,300 of the amount she received from her husband was includable in her gross income under I.R.C. § 71 (a)(3) and that petitioner's proper filing status was "married filing separately." These changes resulted in the deficiency which petitioner contests. In its findings of fact and opinion issued June 5, 1979, and in its decision entered June 7, 1979, the Tax Court held that both redeterminations by the respondent were correct. The court also rejected an attempt by petitioner to place her 1974 taxable year in issue on the ground that her petition with regard to that year was not timely filed.

We affirm on the Tax Court's opinion, 38 T.C.M. (CCH) 889 (1979), which is attached as an appendix hereto. Even if the petition with respect to the 1974 taxable year had been timely filed, the reasons which require rejection of

her claims for taxable year 1973 compel rejection of her similar arguments relevant to taxable year 1974.

AFFIRMED

- - - - - - - - - - - -

No. 79-2154 APPENDIX

T.C. Memo. 1979-221

UNITED STATES TAX COURT

JEAN C. ROSENBAUM, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 7584-77. Filed June 5, 1979

Petitioner was married but living separately from her husband. Held, amounts she received as temporary alimony pursuant to a court order are includable in her gross income. Held further, petitioner's proper filing status was married filing separately. Held further, the Court lacks jurisdiction with respect to petitioner's taxable year 1974.

Jean C. Rosenbaum, pro se.

Judy Jacobs and Virginia C. Schmid, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

STERRETT, Judge: Respondent, on April 12, 1977, issued a statutory notice in which he determined a deficiency in petitioner's Federal income tax for her taxable year ended December 31, 1973 in the amount of $31. The issues presented for our determination are: (1) whether petitioner's 1973 gross income

includes the $1,300 she received from her husband as payment of temporary alimony pursuant to a court order, and (2) whether petitioner's proper filing status for that year was married filing separately or single individual. Petitioner also attempts to place her 1974 taxable year in issue.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts, and the exhibits attached thereto, are incorporated herein by this reference.

Petitioner, Jean C. Rosenbaum, is a married individual whose legal residence was located in Chicago, Illinois at the time of filing the petition herein. She timely filed a return for the calendar year 1973 on which she reported other income of $1,504.50; $1,475 of this amount was temporary alimony. Petitioner checked her filing status as both "single" and "married filing separately". She computed her tax, however, using the rates for one claiming "single" status.

On May 11, 1976, petitioner filed an amended return for her taxable year 1973. On

the amended return she again claimed "single" status, decreased her income in the amount of $1,504.50 and claimed a refund of $260.50.

Petitioner and Kurt Rosenbaum (hereinafter Rosenbaum) were married in 1948 in Cook County, Illinois. Three children were born of this marriage: Jay (in 1949), Richard (in 1951) and Jody (in 1954). Rosenbaum absented himself from the marital home in 1965. Petitioner and her husband have lived separate and apart from each other since that time. These separate living arrangements were not made by petitioner's choice.

In 1969 Rosenbaum filed for a divorce in the Circuit Court of Cook County. The divorce was not granted due to insufficient grounds. In 1971 Rosenbaum filed a partition action with respect to the family home located in Chicago. He again filed a petition for divorce in January of 1972.

When Rosenbaum refused to provide support for petitioner, she requested temporary alimony under Illinois Revised Statute Ch. 40 sec. 16 which provides:

> ***in every suit for a divorce the wife or the husband when it is just and equitable, shall be entitled to alimony during the pendency of the suit***.

Pursuant to her request, the Circuit Court of Cook County issued an order on November 9, 1972 directing, in pertinent part:

> That until further order of this Court, the Plaintiff (Kurt Rosenbaum) shall pay unto the Defendant (Jean Rosenbaum) the sum of $25.00 per week as and for temporary alimony.

The order was signed on November 20, 1972 and was effective as of either November 9 or November 20, 1972. During petitioner's taxable year 1973, Rosenbaum paid her $1,475 in accordance with the above order. Of this amount $175 represented late payments attributable to 1972 and $1,300 represented payments attributable to 1973.

On February 20, 1974 a judgment for divorce was entered in favor of Rosenbaum and his payments under the order ceased. Petitioner immediately appealed the divorce judgment and, after the judgment was reversed and remanded by the Illinois Appellate Court, the complaint for divorce was dismissed on December 1, 1976. Petitioner has never filed for separate maintenance, legal separation or

divorce.

Petitioner resided in the family home during 1973. She made the home available at all times as a residence for her children. However, the children, of their own volition, resided primarily with Rosenbaum.

In the notice of deficiency respondent determined that $1,300 of the amounts received by petitioner from Rosenbaum was includible in her gross income under section 71 (a)(3), I.R.C. 1954. Respondent also determined that petitioner's proper filing status was "married filing separately".

OPINION

Issue 1. Temporary Alimony

Section 71 (a)(3) does not require a divorce or legal separation for inclusion of support payments in the recipient spouse's income. Rather it provides that:

> ***if a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her *** from her husband under a decree *** requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife have a single return jointly.

Petitioner received periodic support payments from Rosenbaum pursuant to a court decree, she

was living separately from him during the year in issue, and they did not file a single, joint return.

Petitioner agrees that under the law, as written, amounts paid her under court decree are includible in her gross income. However, she questions the constitutionality of this portion of the tax code based on her belief, as she views the facts, that a man should not be rewarded financially for deserting his wife. She contends that no wife should be intimidated into divorce by a threat of taxation. She further contends that it is a denial of equal protection to tax a wife for support received pursuant to a court order when no tax accrues to a wife voluntarily supported by her husband.

The constitutionality of section 71 (a)(3) has been upheld on numerous occasions with respect to possible inequalities or injustices it may cause. E.g. Neeman v. Commissioner, 26 T.C. 864, 868 (1956), affd. per curiam 255 F. 2d 841 (2d Cir. 1958), 358 U. S. 841 (1958). The effect of the statute is to treat the payor spouse as a conduit for income transferred to the payee spouse. S. Rept. No. 1631, 77th Cong., 2d Sess. (1942), 1942-2,

C. B. 504, 568. Voluntary support agreements between separated spouses also effect a transfer of taxability (section 71 (a)(2)) while spouses filing a single joint return concurrently pay taxes out of communal funds.

While we sympathize with petitioner's predicament, we have no choice but to hold for respondent on this issue.

Issue 2. Filing Status

Section 1 provides for the payment of taxes at various rates based on the individual's filing status. The individual's marital status, as detined by section 143, is one factor used to establish filing status.

Section 143 provides:

SEC. 143. DETERMINATION OF MARITAL STATUS.

(a) General Rule.--For purposes of this part and part V--

(1) The determination of whether an individual is married shall be made as of the close of his taxable year, except that if his spouse dies during his taxable year such determination shall be made as of the time of such death, and

(2) An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

(b) Certain Married Individuals Living Apart.-- For purposes of this part and Part V, if --

(1) an individual who is married (within the meaning of subsection (a)) and who files a separate return maintains as his home a household which constitutes for more than one-half of

> the taxable year the principal place of abode of a dependent (A) who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the individual, and (B) with respect to whom such individual is entitled to a deduction for the taxable year under section 151,
>
> (2) such individual furnishes over half of the cost of maintaining such household during the taxable year, and
>
> (3) during the entire taxable year such individual's spouse is not a member of such household, such individual shall not be considered as married.

Petitioner was married as of the close of her taxable year. She was not legally separated from Rosenbaum. She has stipulated that the children principally resided with him. Rosenbaum did not file a joint return with petitioner. Therefore, based on the facts before the Court, petitioner's filing status was married filing separately.

Petitioner contends that she provided maintenance and support for her children because, through an oral marriage agreement, one-half of Rosenbaum's provision thereof should be imputed to her. We need not consider this contention because petitioner was not entitled to a section 151 deduction for any or all of her children and, therefore, does not otherwise qualify for application of the section 1(c) tax rates.

Again petitioner asserts a constitutional argument. The constitutionality of the rate

schedules has been upheld. Barter v. United States, 550 F.2d 1239, 1240 (7th Cir. 1977), cert. den. 434 U. S. 1012 (1978).

Finally, petitioner argues that application of section 143(b) violates her right to privacy under the Privacy Act of 1954.[1] That act provides that:

> (b) Conditions of Disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--
>
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> (2) required under section 552 of this title (5 USCS sec. 552);
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (4) to the Bureau of the Census for the purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
>
> (6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

---

[1] 5 U.S.C. sec. 552a.

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting office; or

(11) pursuant to the order of a court of competent jurisdiction.

Obviously disclosure of marital status to the Internal Revenue Service does not fall within the evils envisioned by Congress in enacting this protection. The relevant disclosure is of a pertinent fact by the individual to a government agency. It is not a disclosure of information with respect to such individual between two government agencies or from a government agency to another individual. This disclosure is non-confidential in character and is necessary under the Code as written.

Issue 3, 1974

On brief petitioner attempts to place her 1974 taxable year in issue. The petition filed with respect to that year was not timely. Therefore, after a hearing held November 7, 1977, we found that we lacked jurisdiction with respect to petitioner's taxable year 1974. Petitioner cites Estate of DiPalma v. Commissioner, 71 T. C. 324 (1978) as authority for her position. DiPalma dealt with a negligence penalty for the late filing of a tax return. It is not on point.

Filing requirements are set by section 6213(a) and are strictly construed. Block v. Commissioner, 2 T. C. 761, 762 (1943).

Decision will be entered for the Respondent.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 26, 1980

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. _____
Hon. _____

JEAN C. ROSENBAUM, Petitioner-Appellant, No. 79-2154 -vs- COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	) Appeal from) the) United States) Tax Court)

On consideration of the "MOTION TO STAY MANDATE" filed herein on March 19, 1980, by the pro se petitioner-appellant,

IT IS ORDERED that this request to stay the mandate is hereby DENIED. The petition for rehearing filed herein on March 19, 1980, was timely filed, and automatically stays the mandate pending disposition of the petition for rehearing.

IT IS FURTHER ORDERED that the request to change the covers of the reply brief is hereby denied.

IT IS ALSO FURTHER ORDERED that the motion requesting publication of this court's March 5, 1980, order is hereby DENIED on the grounds that there has been insufficient showing that

this decision satisfies the criteria for publication. This denial is without prejudice to raise the point again.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 9, 1980

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

JEAN C. ROSENBAUM,
Petitioner-Appellant

No. 79-2154 -vs-

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO.

JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se

-vs-

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

NOTICE OF FILING

To:

1. M. Carr Ferguson, Assistant Attorney General
Tax Division, United States Department of Justice
Washington, D. C. 20530
Attn: Gilbert E. Andrews, Chief,
Appellate Section

2. Solicitor General
Department of Justice
Washington, D. C. 20530

PLEASE TAKE NOTICE that on May 31, 1980, I filed through United States Express Mail, with the Clerk of the Supreme Court of the United States, Washington, D. C. 20543, 40 copies of a PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, with an Appendix attached thereto, and Proof of Service, three copies of which are herewith served upon you.

JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se

STATE OF ILLINOIS)
COUNTY OF C O O K) SS

PROOF OF SERVICE

I, Jean C. Rosenbaum, being first duly sworn on oath, depose and state I served this Notice of Filing with three copies of a PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, attached Appendix and Proof of Service, by mailing same via the United States Mail, Certified Mail, Return Receipt Requested, proper postage prepaid, to:

1. M. Carr Ferguson, Assistant Attorney General, Tax Division
United States Department of Justice
Washington, D. C. 20530
Attention: Gilbert E. Andrews,
Chief, Appellate Section

2. Solicitor General
Department of Justice
Washington, D. C. 20530

This mailing took place on May 31, 1980, at the United States Post Office, Canal and VanBuren Streets, Chicago, Illinois, before 5:00 PM.

I further depose and state that all parties required to be served with this document have been served.

Dated: _____

_____
JEAN C. ROSENBAUM,
Petitioner-Appellant, Pro Se

I, _____, a Notary Public for and in the State and County aforesaid, do hereby certify that the foregoing document was

sworn and subscribed to before me by Jean C. Rosenbaum this _____ day of May, 1980.

_____
NOTARY PUBLIC

My commission expires: _____

See copy marked "Notarized" for signatures.

Jean C. Rosenbaum,
Petitioner-Appellant, Pro Se
Chicago, Illinois 60626
973-6047 (312)